Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

CHARLES SULLIVAN, INDIVIDUALLY AND D/B/A SULLIVAN MACHINE & TOOL COMPANY; AND JOSEPHINE SULLIVAN,

Petitioners,

versus

BAYLESS EDWARD BILES, JR. AND WILKINS, BANKESTER, BILES & WYNNE, P.A.; RAY MORGAN THOMPSON AND ARMBRECHT, JACKSON, DeMOUY, CROWE, HOLMES, & REEVES; MAZAK CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR WRIT OF CERTIORARI

JOSEPH J. BOSWELL, ESQ.
P.O. Box 1112
Mobile, Alabama 36633-1112
Telephone: 334-432-9458

Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Did the Alabama Supreme Court unequally apply to Petitioners the established principles of Alabama law on claim preclusion and issue preclusion, by applying rule 60(b)(6) of the Alabama Rules of Civil Procedure in a manner which is contrary to the express language of the rule, which expressly grants the court only the power to "relieve a party or a party's legal representative from a final judgment, order, or proceeding," and holding that Petitioners fraud claims against the attorneys in this civil action are barred under the doctrine of collateral estoppel because the identical issues were actually litigated by Petitioner Charles Sullivan in his rule 60(b)(6) motion for relief from a final judgment entered against him in the circuit court of Baldwin County, Alabama, and thereby deprive Petitioners of their substantive Fourteenth Amendment right to due process of law by denying them a fair trial?

STATEMENT OF THE PARTIES

The caption of the Petition for Writ of Certiorari contains the names of all of the parties in these three consolidated appeals in the Supreme Court of Alabama.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
STATEMENT OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINION AND ORDERS BELOW	1
STATEMENT OF JURISDICTION	1
FEDERAL CONSTITUTIONAL AMENDMENT AND STATE RULE OF CIVIL PROCEDURE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS THE WRIT SHOULD BE GRANTED	21
CONCLUSION	29
APPENDIX	A-1

TABLE OF AUTHORITIES

Page

CASES

Adduono v. World Hockey Association,
824 F.2d 617 (8th Cir. 1987) 25, 26

Bankers Mortgage Company v. United States,
423 F.2d 73 (5th Cir. 1970) 23, 24

Bishop v. United States,
266 F.2d 657 (5th Cir. 1959) 26

Bullen v. Brown,
535 So.2d 76 (Ala. 1988) 24

Constantine v. United States Fidelity & Guaranty Co.,
545 So.2d 750 (Ala. 1989) 27

Ex parte Roland Oden,
617 So.2d 1020 (Ala. 1992) 23

Ex parte Scott,
414 So.2d 939 (Ala. 1982) 23

In Re Murchison,
349 U.S. 133 (1955) 21

N & C Properties v. Windham,
582 So.2d 1044 (Ala. 1991) 27, 28

Opinion of the Clerk, Supreme Court of Alabama,
417 So.2d 945 (Ala. 1982) 24

Pike v. Southern Bell Telephone and Telegraph Co.,
263 Ala. 59, 81 So.2d 254 (1955) 21

Sullivan v. Mazak,
658 So.2d 438 (Ala. 1995) 15

Triple J. Cattle, Inc. v. Chambers,
621 So.2d 1221 (Ala. 1991) 24

TABLE OF AUTHORITIES – Continued

Page

United States v. One 1967 Red Chevrolet Impala Sedan, 457 F.2d 1353 (5th Cir. 1972) 26

United States v. One (1) Douglas A-26B Aircraft, 662 F.2d 1372 (11th Cir. 1981) 26

United States v. One Toshiba Color Television, Appeal Nos. 98-3578 and 98-3579, 2000 WL 669978 at *10 (3d Cir. 5/24/2000) 26

STATUTES

Ala. Code, 1975
§ 12-16-6 14

§ 12-16-150(11) 14, 15

RULES

Alabama Rules of Civil Procedure
Rule 2 24

Rule 3(a) 24

Rule 60(b) ..... *passim*

CONSTITUTION

United States Constitution
Fourteenth Amendment, Section 1 2

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Charles Sullivan, individually and d/b/a Sullivan Machine & Tool Company, and Josephine Sullivan (hereinafter referred to as "Sullivans") petition this Court for a Writ of Certiorari to review the decision in this civil action rendered by the Supreme Court of Alabama.

THE OPINION AND ORDER OF THE SUPREME COURT OF ALABAMA

The Supreme Court of Alabama's Opinion affirming summary judgments against Sullivans in consolidated appeal numbers 1980979 and 1980980, and reversing the trial court's denial of summary judgment against Sullivans in consolidated appeal number 1980771, which is the basis of this Petition, was released on August 11, 2000, and is unreported. That Opinion is reproduced as Appendix A marked as pages A-1 through A-13.

The Supreme Court of Alabama denied Sullivans' application for rehearing without written opinion in an Order entered on March 30, 2001. That Order is unreported and is reproduced as Appendix B.

STATEMENT OF JURISDICTION

The Opinion of the Supreme Court of Alabama was released on August 11, 2000. The Order denying Sullivans' application for rehearing was entered on March 30, 2001.

The jurisdiction of this Court is invoked pursuant to 28 USC 1257(a).

THE FEDERAL CONSTITUTIONAL AMENDMENT AND THE STATE RULE OF CIVIL PROCEDURE INVOLVED

The Fourteenth Amendment of the United States Constitution, Section 1, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Rule 60(b) of the Alabama Rules of Civil Procedure provides:

"On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment

should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than four (4) months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from any appellate court except during such time as an appeal from the judgment is actually pending before such court. If leave of the appellate court is obtained, the motion shall be deemed to have been made in the trial court as of the date upon which leave to make the motion was sought in the appellate court. This rule does not limit the power of a court to entertain an independent action within a reasonable time and not to exceed three (3) years after the entry of the judgment (or such additional time as is given by § 6-2-3 and § 6-2-8, Code of Alabama 1975) to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, supersedeas, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

STATEMENT OF THE CASE

On March 15, 1995, Charles Sullivan, individually and d/b/a Sullivan Machine & Tool Company, and his wife, Josephine Sullivan (hereinafter "Sullivans"), filed this civil action in the circuit court of Mobile County against attorney Bayless Edward Biles, Jr. (hereinafter

"Biles") and his law firm, Wilkins, Bankester, Biles & Wynne, P.A. (hereinafter "Wilkins-Bankester"); attorney Ray Morgan Thompson (hereinafter "Thompson") and his law firm, Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves (hereinafter "Armbrecht-Jackson"); and Mazak Corporation (hereinafter "Mazak"). (C.1-7 & C.754). This lawsuit arises out of the following events.

On February 28, 1991, Sullivans d/b/a Sullivan Machine & Tool Company filed their complaint in the Circuit Court of Baldwin County, Alabama (hereinafter "Baldwin County Action") against Mazak, John Lampi (hereinafter "Lampi"), and others. (C.581). During the voir dire jury qualifications conducted by the trial judge and the attorneys, the trial judge made the following statement to all prospective jurors:

> "THE COURT: All right. Next, I'm going to ask some questions that primarily touch on matters that deal with qualifications that are required as a matter of law, although some of my questions will be for general information. And the purpose of the court's asking the questions – and after I have finished, the attorneys for the Plaintiff and the Defendants will have an opportunity to ask additional questions. But the purpose of the questions, whether they come from the Court or the lawyers, is to seat as fair and impartial a jury as is possible to hear this case. And it is not anybody's intention to pry into your private affairs; however, if any question is asked that for any reason you don't want to answer in front of everybody, just raise your hand and we'll take care of the matter at the bench. I won't let the lawyers get out of line with their questions, but sometimes questions are asked that you may have some reason or may be embarrassing for you.

> The Plaintiffs, or the persons bringing the claim to court, are Charles Sullivan and Josephine Sullivan.
>
> Are any potential jurors related by blood or marriage to Mr. and Mrs. Sullivan? (No audible response.)" (C.912-913)[1]

Thereafter, the trial judge asked the following question during his voir dire:

> "THE COURT: And I'm going to also read the other names of the partners and associates of Mr. Thompson and Mr. Copeland. And when I finish, I'm gonna ask the same questions about relationship, by blood or marriage and so forth. All right. And this is a list of Mr. Thompson and Mr. Copeland's partners or associates: Marshall J. DeMouy; William Armbrecht, III; Rae Crowe; Broox Holmes; Boyd Reeves; E. B. Peebles, III; F.M. Keeling; William B. Harvey; Kirk Shaw; Norman Waldrop, Jr.; Conrad Armbrecht; Edward Hawkins; Grover Asmus, II; David Bagwell; Douglas Brown; Donald Radcliff; C.I. Gruenewald; J. Donald Hughes; Kathleen Miller; Dabney Foshee; Edward Dean; David Hudgens; Ray Thompson; James Dale Smith; Duane Graham; Robert Mulligan; William Steele Holman, II; Coleman Meador; Broox Holmes, Jr.; James Robertson, Jr.; Scott Brown; Clifford Brady; Richard Franklin; Stephen Copeland; William Austin Mulherin – how do you pronounce that?
>
> MR. THOMPSON: Mulherin.

---

[1] The portions of the reporter's transcript in the Baldwin County Action which are quoted in this Petition are included in the clerk's record on appeal in this civil action. There is no reporter's transcript in this civil action.

THE COURT: Tara Bostick; Rodney Cate; James Watkins. Okay.

Are any potential jurors present or former clients of the firm of Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves? (No audible response.)

THE COURT: And do any potential jurors know or are you friends or social acquaintances with any of those lawyers? (No audible response.)" (C.919-920)

Thereafter, while Sullivans' trial counsel was propounding voir dire questions, he asked the following question, which prompted the following exchanges:

"MR. GIBSON: Right. Now, you've already been asked if you are related to the lawyers or if you know them in the way that the judge has described, a friend and what-not. I would like to know if now having had some more time to think about it, you recognize any of the lawyers here as people that you know for any reason. If you know them, I would like to know that. You know them at all?

A PROSPECTIVE JUROR: I know Bayless Biles.

MR. GIBSON: Oh, Mr. Biles. Thank you.

THE COURT: You're not connected with this case, are you?

MR. BILES: No, sir.

MR. GIBSON: You are Mr. Jones; is that right?

Thank you, Mr. Jones. Yes, ma'am, Mrs. McInnish.

A PROSPECTIVE JUROR: The same.

MR. GIBSON: You know Mr. Biles? Ms. Thompson, you know him, too?

A PROSPECTIVE JUROR: I have been knowing Bayless a long time." (C.954-955)

Thereafter, Ray Morgan Thompson (hereinafter "Thompson"), attorney for Mazak and the other defendants, commenced his voir dire:

> "THE COURT: All right. Any questions for the Defendants?
> MR. THOMPSON: Yes, Your Honor. May it please the Court, ladies and gentlemen, I'm Ray Thompson and along with Rus Copeland, we have the pleasure of representing Mazak Corporation . . . [and] John Lampi . . . in this lawsuit." (C.956)

The jury was struck and the trial concluded with the jury verdicts in favor of Mazak on all of the claims of Charles Sullivan d/b/a Sullivan Machine & Tool Company[2] (hereinafter "Sullivan") against Mazak, and in favor of Mazak and against Sullivan on Mazak's counterclaim. Judgments were entered on the jury verdicts. (C.588-589)

Sullivan filed a timely motion for judgment notwithstanding the verdict, or in the alternative, motion for a new trial, which was denied. (C.589-590) He then timely filed notice of appeal to the Alabama Supreme Court from Mazak's final judgment against him. (C.590)

While Sullivan's appeal was pending, pursuant to leave granted by the trial judge, Sullivan took the deposition of attorney Biles. (C.410) During that deposition, the following questions were asked and answers given by Biles:

> "Q. And you did not advise the Court –
> A. You didn't hire me to help you strike the jury." (C.411)

---

[2] Josephine Sullivan was dismissed as a plaintiff and counter-defendant after all parties had rested, and before the case was submitted to the jury.

* * *

Q. " . . . Okay, sir. Now, did you tell Mr. Thompson before voir dire began that you recognized at least the two names you've indicated here in your testimony today, your brother-in-law and the lady whose name was Gail – I don't know the last name.

A. McInnish.

Q. McKinney?

A. McInnish.

Q. McInnish.

A. Number 81 on your list. I think it's 81. You've got a 2A by it. I think she was an alternate.

Q. All right.

A. I have no specific recollection of telling him.

A. I'm sure I did.

Q. All right. Now, after the voir dire portion had concluded –

A. I think, actually, I had a yellow pad that I made notes on.

Q. Your memory is, you had a yellow pad?

, and don't ask me where that is.

Q. All right. But your memory is that you made notes; is that correct?

A. Yes.

Q. Would it be a fair assumption that you made a note that you were related to Mr. Pete Jones?

A. No. I didn't have to make that note.

Q. It was obvious; is that right?

A. Yeah.

Q. All right. Now, you've told us, sir, that he is your brother-in-law?

A. My wife's brother." (C.414-415)

Thereafter, pursuant to the Alabama Rules of Civil Procedure (hereinafter "ARCivP") Sullivan filed a rule 60(b)(6) ARCiv.P. motion to set aside Mazak's final judgment against him (hereinafter "60(b)(6) motion"). In the 60(b)(6) motion, Sullivan alleged in pertinent parts:

"COMES NOW the Plaintiff, Charles W. Sullivan, and files this Motion for Relief from Judgment or Order Pursuant to Rule 60(b)(6) ARCP filed within a reasonable time and Alternative Request of Treatment as an Independent Action filed within a period of time not to exceed three (3) years after entry of the March 24, 1993 judgment in this matter *for all of the grounds stated hereafter* (including the attached March 3, 1994 post judgment deposition of Bayless Biles allowed by the trial court pursuant to rule 27(b) ARCP and the affidavits of W. Kenneth Gibson, Jo Sullivan and Charles W. Sullivan):" (C.670)

* * *

"VI. *Concealment of the True Relationship of Bayless Biles from the Court and from Sullivan's Attorney.* Mazak and its attorneys in this matter, (Ray Thompson, Steve Copeland, and Bayless Biles) concealed from the Court and from Sullivan's attorney the true relationship of Bayless Biles who had been hired by the Appellee and its attorneys approximately a week in advance of trial to assist in the selection of jurors during voir dire. As detailed hereafter, juror Pete Jones is the brother-in-law of Bayless Biles and he became the jury foreman in this matter. The true relationship of Mr. Biles to Mr. Jones was never disclosed to the Court nor to the Sullivans' attorney as detailed hereafter in summary of the

deposition of Bayless Biles. The post-judgment deposition of Mr. Biles was taken with leave of the Trial Court on March 3, 1994 pursuant to Rule 27, ARCP. A truthful response to the question addressed by the Court concerning the connection of Mr. Biles would have resulted in the exclusion of Mr. Jones from the Trial Jury preventing injury and damage to the plaintiff. The plaintiff was deprived of rights secured by the constitution and laws of the State of Alabama." (C.677-678)

* * *

"VIII. *Information obtained from the March 3, 1994 Deposition of Bayless Biles (copy attached original filed in Circuit Court).*"

* * *

"Mr. Biles described that the purpose of voir dire was to *"find out whether or not – well to find out what jurors' biases and prejudices are so that you can pick a fair and impartial jury for both sides. The practice in 1993 was for the lawyers to ask questions to find out "their biases and prejudices so they can pick a fair and impartial jury.* (R-10)"

* * *

"Mr. Biles acknowledged that he was hired to participate in the voir dire of Sullivan vs. Mazak and was paid approximately $500. (R-15) He was called in advance of the trial date and was told by Ray Thompson that the lawsuit involved a machine being sold by Mr. Thompson's client (Mazak) to your client (Sullivan). He understood 'there was a dispute as to whether or not the machine worked properly. Supposedly your client was still able to use the machine and make money off the machine and had done so, but had not paid for the machine.' (R-16)

Mr. Biles believed that contact had been made about a week or two before the trial date.

Mr. Biles described the practice in Baldwin County on the first day of a trial session was to organize the jurors to see who is present and prepare a document which is called a panel list in which those individuals who are present have been organized and placed on a panel. (R – 18) *He specifically reviewed a panel list. He recognized Exhibit 2 to his deposition as a list of the panels involved in the Sullivan trial.* (R.18)"

* * *

"Mr. Biles is familiar with the voir dire procedure where the Court brings the jurors into the courtroom, asks them some initial questions, and then the lawyers have the right to ask other questions. (R-21) *He was present during that stage of the Sullivan trial.* (R-21)

During this portion of the trial, Mr. Biles was sitting in the jury box or standing to the left of the Judge's bench. (R-23) This would allow him to look into the audience and see the prospective jurors. (R-23) He made notes of his observations on a panel list or perhaps a yellow note pad, neither of which he retained. (R-24) *Pete Jones is his wife's brother.* Bayless has been married sixteen years. He and his wife grew up together in the Bay Minette community and had come to know Pete Jones after he had married his sister sixteen years ago. (R-26)

Mr. Biles testified that he made an absolutely conscious effort not to even acknowledge the presence of his brother-in-law. (R-27) Stating: *'Because I knew that I was in a position that I didn't want to have to end up explaining if he got on this jury . . . anything.'* (R. 27)"

* * *

"Mr. Biles helped Mazak strike the jury, gave them his opinions on who he thought should be on and should be left off. He told Mr. Thompson that his brother-in-law should be on this jury because 'he is very conservative and believes in paying his bills. He knows all about equipment.' (R-29). . . . "

* * *

"*Mr. Biles returned and watched some of the trial.* Mr. Biles came over there *maybe three or four times* and stayed thirty minutes and left. (R-33)"

* * *

"Mr. Biles recalled a question from Judge Partin at the time of voir dire as to whether or not he was connected with the case and the fact that he gave an answer "no, sir". He did not believe it was necessary to correct that response.

Mr. Biles said nothing to the undersigned (W. Kenneth Gibson), who served as Mr. Sullivan's counsel *because "you didn't hire me to help you strike the jury"*. (R-49)" (C.679-682)

* * *

" * * * Our legal system cannot tolerate injustice, and a fair interpretation of the Rules of Civil Procedure not only supplies a remedy but also gives meaning to the spirit behind those rules." (C.682)

* * *

"Mazak's conduct (and that of its attorneys) deprived Sullivan of the fair and impartial trial guarantee of Article I, Section 6, of the Alabama Constitution, and of rights secured by the United States Constitution." (C.683)

* * *

"XIII. *Relief Requested.*

Charles W. Sullivan requests the following relief from this Court:

(a) Entry of an Order by the Court pursuant to Rule 60(b)(6) granting a new trial in this cause for all of the reasons described in this motion." (C.687) (All emphasis are added in original).

On May 9, 1994, the trial judge granted the 60(b)(6) motion. That order states in its entirety:

"This matter coming on for consideration of the Rule 60 motion filed by CHARLES & JOSEPHINE SULLIVAN, D/B/A SULLIVAN MACHINE, the court has considered the argument of counsel and the deposition of the Honorable Bayless Biles. Upon consideration of the foregoing, the court is of the opinion that the following order is due to be entered. It is therefore ORDERED, ADJUDGED and DECREED by the Circuit Court of Baldwin County, Alabama, as follows:

1. The court finds and determines that when it asked Mr. Biles if he was connected to the case, there was a misunderstanding. Mr. Biles took the question to mean was he an attorney in the case rather than a jury consultant. The court expressly find that Mr. Biles had no intention to mislead the court and the court determines that there was no improper conduct on the part of Mr. Biles.

2. The court is of the opinion that the jury selection process is one of the most critical parts of any trial. In this case, Mr. Biles did participate as a jury consultant and was paid for his services.

3. Because Mr. Biles' brother-in-law served on the jury and was its foreman, had the court been

aware of the fact Mr. Biles was assisting in the jury selection process, Mr. Jones would have been subject to challenge for cause.

4. The court expressly finds and determines that the Honorable Ken Gibson had no way of knowing that Bayless Biles was participating as a jury consultant or that Mr. Jones was related by marriage to Mr. Biles. While there was no misconduct on the part of Mr. Biles, the court is of the opinion that CHARLES & JOSEPHINE SULLIVAN, D/B/A SULLIVAN MACHINE is due relief under Rule 60 because had all of the facts been known to the court, he would have been able to successfully challenge Mr. Jones for cause. Therefore, the court orders that a new trial be ordered. The case is restored to the active docket." (C.795-796)

§ 12-16-6, *Ala. Code*, 1975, provides:

"It is the duty of the court, before administering the oath prescribed by law to any grand, petit or tales jurors, to ascertain that such juror possesses the qualifications required by law, and the duty required of the court by this section shall be considered imperative."

§ 12-16-150, *Ala. Code*, 1975, provides in pertinent part:

"It is good ground for challenge of a juror by either party:

* * *

(11) That the juror, in any civil case, is * * * related by consanguinity within the ninth degree or by affinity within the fifth degree, computed according to the rules of civil law, to any attorney in the case to be tried. . . . "

It is clear from the language contained in the order granting the 60(b)(6) motion that the trial judge was asking Biles if he was an attorney in the case, and it is

clear from the order that he *found* that Biles was *an attorney in the case to be tried.* § 12-16-150(11) does not provide a challenge for cause because a prospective juror and a "jury consultant" are related within the prohibited degree.

Mazak filed notice of appeal to the Alabama Supreme Court from the order granting the 60(b)(6) motion. (C.591). Mazak thereafter filed a petition for writ of mandamus praying that the writ issue commanding the trial judge to vacate his order granting the 60(b)(6) motion.

In *Sullivan v. Mazak,* 658 So.2d 438 (Ala. 1995) this Alabama Supreme Court dismissed Mazak's appeal from the order granting the 60(b)(6) motion because it was an interlocutory and non-appealable order; denied Mazak's petition for the writ of mandamus; and dismissed Sullivan's appeal from Mazak's final judgment as being moot.

After this civil action was commenced on March 15, 1995, on February 15, 1996, Sullivans took the deposition of Lampi, who was a defendant in the still pending Baldwin County Action (C.417). During that deposition, the following questions were asked and answers given by Lampi:

> "Q. Okay. Do you recall that you did not arrive on the day that the jury was actually struck, did you?
>
> A. That's correct.
>
> Q. And was this because of a snowstorm?
>
> A. Yes, sir, it was.
>
> Q. All right. And you got here on a Tuesday; is that correct?
>
> A. The next day, yes.
>
> Q. And the trial began on the Wednesday, the next day; is that correct? As you best recall?

A. Yes. I believe that's correct.

Q. All right. I'm going to ask you some questions first concerning conversations, two in particular, that you have had with Jo Sullivan and Sully or Charles Sullivan. Okay?

A. Yes, sir.

Q. The dates are May 25, '94 and December 11, '95. Okay?" (C.418)

* * *

"statement (reading aloud):

It was like the second or third, about the third day into the trial, is when I first heard something about the guy being a relative of this Biles. And we had a friend on the jury. And I was trying to figure out who in the hell Biles was. (Emphasis added by Court Reporter.)

A. Yes, sir. That sounds about right.

Q. All right. And you acknowledge making that statement; is that correct?

A. Words to that effect, yes.

Q. All right, sir. You did to discover then that – did you know who Bayless Biles was at that time?

A. No, sir.

Q. Had you met or talked to him, to your knowledge?

A. During all of this?

Q. Yes.

A. I might have met him later in the week. He might have been introduced to me. I wouldn't say that I didn't meet him." (C.419)

"I can't remember who-all was present. If it was Neville, Eichelman, Thompson and myself in the hall, but that's when I heard that Biles had a friend on the jury, and I was trying to figure out who the

hell Biles was. (Emphasis added by Court Reporter.)

Do you recollect that statement?

A. Yes, sir, but I can't tie it to your date. That's the only problem I have.

Q. Okay. You recognize the statement –

A. Yes, sir.

Q. – having said that, but you don't know if it was said on that date of December 11, '95?

A. That's correct.

Q. And that was a true statement?

A. Yes, sir.

Q. All right, sir. Was there anybody else present there that you would have had a conversation like that with other than someone associated with the trial, meaning the lawyers, the people from Mazak, yourself, Eichelman and Miller?

A. No. They were the only ones that – we were all together." (C.421)

Sullivans allege in their complaint filed in this civil action in substance that the false response of Biles to the trial judge's question asking whether he was connected with the case for which the jury was then being struck, and Thompson's failure to inform the trial judge and Sullivans' counsel that the answer of Biles was not correct, was a fraud on the court, and a fraud on Sullivans.

On February 1, 1999, the trial judge granted summary judgment in favor of Thompson and Armbrecht-Jackson; and Mazak; and denied Biles' and Wilkins-Bankester's motion for summary judgment. The trial judge stated in that order:

"This matter was taken under submission after oral argument on all defendants motions for

summary judgment. The Court is of the opinion that the Defendant Ray Morgan Thompson owed no duty to the Plaintiffs to respond to the question posed by Judge Partin to the Defendant Bayless Edward Biles Jr. and further the Plaintiffs did not have the status of a third party beneficiary. Summary judgment is granted on behalf of Defendants Ray Morgan Thompson, Armbrecht, Jackson law firm, and Mazak Corporation. The Court further is of the opinion that when Defendant Bayless Edward Biles Jr. responded to the question by Judge Partin, he had a duty not only to the Court but to all litigants to speak the truth. Whether the response by Defendant Biles was the truth or some type of fraudulent statement is a question of fact for the jury. Summary judgment for Defendant Biles and Wilkins Bankester law firm is denied.

The Court further is of the opinion that the Defendant Biles, as a jury consultant, was acting as an independent contractor and there is no liability for Thompson or the Armbrecht law firm based on respondeat superior. If any party wants these questions (rulings) certified, the Court will do so. Count five (5) is dismissed on stipulation of the Plaintiff." (C.759).

All parties timely appealed.

Sullivans are the appellants in appeal numbers 1980979 and 1980980, and the appellees in appeal number 1980771. The three appeals were consolidated.

On August 11, 2000, the Alabama Supreme Court released the Opinion in the consolidated appeals, affirming the summary judgment in favor of Thompson and Armbrecht-Jackson; and Mazak; and reversing the denial of Biles' and Wilkins-Bankester's motions for summary judgment. The Alabama Supreme Court held that all of

the defendants' affirmative defense of collateral estoppel was a complete defense in bar to the fraud claims made against all defendants in this civil action, finding that Sullivans' fraud claims against the attorneys representing adverse parties in the Baldwin County Action were actually litigated in Sullivan's 60(b)(6) motion filed in the Baldwin County Action.

Sullivans timely filed an application for rehearing. In that application, the grounds assigned included the following:

> "2. This Honorable Court erred in affirming and reversing based upon the finding of this Court that Sullivans' action against all defendants in this civil action is precluded under the doctrine of collateral estoppel. Preclusion does not apply for the following joint and separate reasons:
>
> A. Charles Sullivan did not litigate and could not have litigated any claim or issue involved in this civil action in the proceeding initiated by him in the Baldwin County Action when he filed the 60(b) motion making application to the trial court for an order relieving him from the final judgment entered in favor of Mazak Corporation and against him in the Baldwin County Action, because the trial judge had no power in the 60(b) proceeding to award any relief of any kind, beyond relieving Charles Sullivan from the final judgement.
>
> B. If the trial judge had denied the 60(b) motion, the order denying the 60(b) motion would not have prejudiced Bayless Biles (hereafter "Biles") or Ray Morgan Thompson (hereafter "Thompson").
>
> C. Charles Sullivan's filing of the 60(b) motion did not constitute the commencement of an "action".

D. The fact that Biles and Thompson were named in the allegations made in the 60(b) motion, by Charles Sullivan alleging that he was entitled to relief from Mazak's judgment against [him] because of wrongs committed by Biles and Thompson in their respective capacity as an attorney for Mazak, did not make Biles or Thompson a "party" in the 60(b) proceeding.

E. The "order" issued by the trial judge in response to the 60(b) motion which relieved Charles Sullivan from Mazak's final judgment, is not a "judgment" within the meaning of the word "judgment" as being an element of collateral estoppel.

F. The hearing conducted by the trial judge in the proceeding which was initiated by the filing of the 60(b) motion, did not constitute the "litigation" of any "issue" which is now involved in this civil action.

G. Even if the "order" the trial judge made in response to the 60(b) motion was a "judgment" within the meaning of a "judgment" being an element of collateral estoppel, it was not a "final" judgment at the time this civil action was commenced.

2. The failure of this Court to disclose in the Opinion the finding made and reason expressly given by the trial judge for granting the 60(b) motion, and the failure of this Court to disclose in the Opinion that this Court denied Mazak's petition for a writ of mandamus to the trial judge for having granted the 60(b) motion, constitutes a denial and deprivation of Sullivans 14th amendment due process right of a fair appellate review.

3. This Court's incorrect application of the principles of law pronounced by this Court, which are controlling for the determination of

the questions of issue preclusion and claim preclusion, constitutes a deprivation and denial of Sullivans 14th amendment due process right to a fair appellate review.

4. The trial judge erred to a reversal by finding as a matter of law that Thompson owed no duty to the court or to Sullivans and their attorney to disclose during the voir dire of prospective jurors the fact that Biles was "connected" with that case."

On March 30, 2001, that application was overruled.

REASONS THE WRIT SHOULD BE GRANTED

I

THE OPINION OF THE ALABAMA SUPREME COURT IN THESE CONSOLIDATED APPEALS, HOLDING THAT THE ORDER GRANTING SULLIVANS' 60(b)(6) MOTION IN THE BALDWIN COUNTY ACTION IS PRECLUSIVE OF THE ISSUES INVOLVED IN SULLIVANS' CLAIMS IN THIS CIVIL ACTION UNDER DOCTRINE OF COLLATERAL ESTOPPEL, CONSTITUTES A JUDICIAL DEPRIVATION AND DENIAL OF SULLIVANS' FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL.

The Fourteenth Amendment of the United States Constitution guarantees that no state shall deprive any person of life, liberty or property without due process of law.

A fair trial is a basic requirement of constitutional due process. *In Re Murchison*, 349 U.S. 133, 136 (1955).

In *Pike v. Southern Bell Telephone and Telegraph Co.*, 263 Ala. 59, 81 So.2d 254 (1955), the Alabama Supreme Court stated:

> In the case of Zeigler v. South & North Ala. R. R. Company, 58 Ala. 594, 598, 599, Justice Stone said: " 'Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights * * * They were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' " – Cooley Cons.Lim. 355.
>
> * * *
>
> "In addition to the protection afforded appellant by the law of Alabama, the Fourteenth Amendment to the Federal constitution prohibits any State of depriving any person of life, liberty or property without due process of law. Even Rhode Island admits this provision of the Federal Constitution is applicable to civil cases. . . . "
>
> 81 So.2d at 266

For the reasons hereafter argued, the Alabama Supreme Court disregarded all of its own established and controlling principles of law on claim preclusion and issue preclusion, which it did not overrule in these consolidated appeals, and ruled against Sullivans in these consolidated appeals by applying rule 60(b)(6) of the Alabama Rules of Civil Procedure to Sullivans in a manner which is contrary to the express language of the rule granting, and thereby limiting, power for the court to "relieve a party or a party's legal representative from a final judgment, order, or proceeding," and by applying the rule in a manner it has never been applied before, and in a manner every court has ruled it cannot be applied.

II

SULLIVAN DID NOT "LITIGATE" AND *COULD NOT HAVE LITIGATED* IN HIS 60(b)(6) IN THE BALDWIN COUNTY ACTION, ANY ISSUE OR CLAIM MADE IN THIS CIVIL ACTION.

The Alabama Supreme Court held in *Ex parte Scott*, 414 So.2d 939 (Ala. 1982) that because the ARCiv.P. are patterned after the FRCiv.P., cases construing the FRCiv.P. are considered to be authority for construing the ARCiv.P. In *Ex parte Roland Oden*, 617 So.2d 1020, 1027 Ala. 1992), the Alabama Supreme Court specifically stated that because of the similarity between Rule 60(b) ARCiv.P. and Rule 60(b) FRCiv.P., the two rules should be similarly interpreted.

In *Bankers Mortgage Company v. United States*, 423 F.2d 73 (5th Cir. 1970), the Fifth Circuit stated:

> "Rule 60(b) contemplates two distinct procedures for obtaining relief from a final judgment. The first is by *motion*. 60(b) is directly involved in this procedure as it provides (a) the authority to secure relief by motion, (b) the time limitations within which the motion must be filed, and (c) the grounds on which relief can be predicated. This procedure is intended to completely replace the ancillary common law and equitable remedies of coram nobis, coram vobis, audita querela, bill of review and bill in the nature of a bill of review, which are specifically abolished by this rule. The *motion* for relief from final judgment *must be filed* in the district court and in the action in which the original judgment was entered. No independent jurisdictional ground is necessary because the motion is considered ancillary to or a continuation of the original suit. . . . " (Emphasis added).

> "The second procedure contemplated by Rule 60(b) is an *independent action* to obtain relief from a judgment, order, or proceeding. The first saving clause specifically provides that 60(b) does not limit the power of the court to entertain such an action. . . . " (Emphasis added).
>
> * * *
>
> " . . . [T]he original bill, or *independent action*, to impeach for fraud, accident, mistake or other equitable ground is founded upon an independent and substantive equitable jurisdiction. [Emphasis added.]" (Emphasis added).
>
> 423 F.2d at 78-79

There is only one form of action in Alabama, which is known as a "civil action". *Rule 2 ARCiv.P.* A civil action is commenced by filing a complaint with the court. *Rule 3(a) ARCiv.P.* In *Opinion of the Clerk, Supreme Court of Alabama,* 417 So.2d 945 (Ala. 1982), it is stated:

> "An original filing for cost purposes within the meaning of Rule 7 is the filing of a case. (Citations omitted). A *case*, within the meaning of Rule 7, is a *suit* or *action* in court. (Citations omitted)." (Emphasis added).
>
> 417 So.2d at 946

In *Triple J. Cattle, Inc. v. Chambers,* 621 So.2d 1221 (Ala. 1991), the Alabama Supreme Court stated:

> ". . . . The caption of the complaint indicates the parties to a judgment on that complaint. See Rule 10(a), A.R.Civ.P. (requiring that 'in the *complaint* the title of the action shall include the *names* of all the parties')." (Emphasis added).
>
> 621 So.2d at 1223

In *Bullen v. Brown,* 535 So.2d 76 (Ala. 1988), the Alabama Supreme Court stated:

> "Rule 7(a), ARCP, explains the nature of the term 'pleading': 'There shall be a complaint and

an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed.' A *motion*, defined in Rule 7(b), ARCP, as 'an *application* to the court for an *order*' is not a pleading. . . . " (Emphasis added).
535 So.2d at 79

In *Adduono v. World Hockey Association*, 824 F.2d 617, 620 (8th Cir. 1987) the Eighth Circuit stated:

"On August 6, 1985, the WHA filed a Fed. R. Civ. P. 60(b)(6) motion requesting an order directing Abrahams' law firm to 'segregate out all funds which otherwise would be payable to Abrahams pursuant to the [settlement agreement] and place such funds in an escrow account . . . pending further order of the court.' The district court granted the WHA's motion on October 24, 1985. Significantly, however, the district court, in its December 1985 order, did not refer to the Fed. R. Civ. P. 60(b)(6) motion, but rather based its decision on the inherent authority of the court and its authority under Fed. R. Civ. P. 11. Thus, it is unclear whether the court's action was pursuant to Fed. R. Civ. P. 60(b)(6). We will treat the order as made pursuant to Fed. R. Civ. P. 60(b)(6), because the proceeding was *initiated* by such a *motion* and the district court entered one *order* in *response* to that *motion*. (Emphasis added).

Under Rule 60(b), the district court may grant relief from a final order or judgment for mistake, newly-discovered evidence, fraud, voidness, satisfaction, or other reasons. Rule 60(b) is available, however, only to set aside a prior

> order or judgment. *It cannot be used to impose additional affirmative relief.* United States v. $119,980, 680 F.2d 106, 107 (11th Cir. 1982). . . . " (Emphasis added).
> 824 F.2d at 620

Other United States Circuit Courts of Appeals held in the following cases that a claim for affirmative relief in a rule 60(b) FRCiv.P. motion is outside the scope of rule 60(b), which only authorizes a trial court to grant relief from a final judgment or order, and claims for affirmative relief must be made in a new and independent suit: *United States v. One Toshiba Color Television*, Appeal Nos. 98-3578 and 98-3579, 2000 WL 669978 at *10 (3d Cir. May 24, 2000); *Bishop v. United States*, 266 F.2d 657 (5th Cir. 1959); *United States v. One 1967 Red Chevrolet Impala Sedan*, 457 F.2d 1353 (5th Cir. 1972); *United States v. One (1) Douglas A-26B Aircraft*, 662 F.2d 1372, 1377 (11th Cir. 1981).

Sullivan filed the rule 60(b)(6) *motion* in the Baldwin County Action in which Mazak's judgment was entered against him. Biles and Thompson did not become parties to that civil action merely by reason of allegations being made in that motion that Sullivan was entitled to relief from Mazak's judgment because of the conduct of Mazak's attorneys.

As a matter of law, Sullivan could not have *litigated* on the merits in the rule 60(b)(6) motion proceeding any claim made by Sullivans in this civil action, nor could he have *litigated* on the merits any issue involved in any claim in this civil action. The trial judge in the Baldwin County Action granted to Sullivan all the relief which the court had the power to grant in the proceedings initiated by the 60(b)(6) motion, which was to grant Sullivan relief from Mazak's final judgment against him.

III

UNDER ESTABLISHED ALABAMA RULES OF LAW ON CLAIM PRECLUSION AND ISSUE PRECLUSION, THE AFFIRMATIVE DEFENSE OF COLLATERAL ESTOPPEL IS NOT AVAILABLE TO DEFENDANTS AS A DEFENSE TO SULLIVANS' FRAUD CLAIMS IN THIS CIVIL ACTION.

In the Opinion, the Alabama Supreme Court stated:

> "Biles and Wilkins-Bankester argue that the doctrine of collateral estoppel precludes Sullivan from relitigating in the Mobile County action the issue whether in the Baldwin County action they misrepresented or suppressed the fact that the jury foreman was Biles's brother-in-law. For the doctrine of collateral estoppel to apply, the following elements are required:
>
> " '(1) that an issue in a prior action was identical to the issue litigated in the present action; (2) that the issue was actually litigated in the prior action; (3) that resolution of the issue was necessary was necessary to the prior judgment; and (4) that the same parties are involved in the two actions."
>
> *Smith v. Union Bank & Trust Co.*, 653 So.2d 933, 934 (Ala. 1995).
>
> " ' "Where these elements are present, the parties are barred from relitigating issues actually litigated in the prior [action]." *Smith*, 653 So.2d at 934 (quoting *Lott v. Toomey*, 477 So.2d 316, 319 (Ala. 1985))." (Appendix A, page A-9).

In *N & C Properties v. Windham*, 582 So.2d 1044 (Ala. 1991) the Alabama Supreme Court restated the elements of collateral estoppel which had been enunciated in all decisions prior to *Constantine v. United States Fidelity & Guaranty Co.*, 545 So.2d 750 (Ala. 1989). In *Constantine* the Alabama Supreme Court "refined" the elements of the

doctrine of collateral estoppel, all of which must be established to sustain an affirmative defense of collateral estoppel. In *N & C Properties*, the Alabama Supreme Court stated:

> "This Court has frequently discussed the doctrine of collateral estoppel, addressing the requirements necessary for application of the doctrine. In Wheeler v. First Alabama Bank of Birmingham, 364 So.2d 1190 (Ala. 1978), we stated that 'collateral estoppel operates where the subsequent suit between parties is not on the same cause of action,' and that the 'requirements for collateral estoppel to operate are (1) issue identical to one involved in previous suit; (2) issue actually litigated in prior action; and (3) resolution of the issue was necessary to the prior judgment.' (Emphasis supplied.) Id. at 1199 (citing Stevenson v. International Paper Co., 516 F.2d 103 (5th Cir. 1975)). The Wheeler requirements were *refined* in Constantine v. United States Fidelity & Guaranty Co., 545 So.2d 750 (Ala. 1989), in which we enunciated two requirements for the application of the doctrine of collateral estoppel:
>
> '(1) *The party claiming the benefit of the prior judgment as an estoppel against the adversarial party is one who would have been prejudiced by a contrary decision in the previous case*; and (2) the party against whom the estoppel by judgment is sought either was an actual party in the previous case or was in privity with, or is a successor to the rights of, an actual party in the previous case.' Id. at 755-756. . . . " (Emphasis added).
>
> 582 So.2d at 1046

If the trial judge had denied Sullivan's 60(b)(6) motion in the Baldwin County Action, neither Biles nor Thompson would have been prejudiced by that order.

CONCLUSION

Sullivans have been deprived and denied their Fourteenth Amendment due process right to a fair trial in the Alabama judicial system. This Honorable Court should grant this petition for writ of certiorari to the Alabama Supreme Court, the highest appellate court in Alabama, and command that Court to reverse the summary judgments entered against Sullivans in appeal numbers 1980979 and 1980980, and to affirm the denial of summary judgment against Sullivans in appeal number 1980771.

Respectfully submitted,

JOSEPH J. BOSWELL
Attorney of Record
for Petitioners
P.O. Box 1112
Mobile, AL 36633-1112
Telephone: (334) 432-9458
Fax: (334) 432-9979

APPENDIX A

SUPREME COURT OF ALABAMA

Bayless Edward Biles, Jr., and Wilkins, Bankester, Biles & Wynne, P.A., v. Charles Sullivan et al.; Charles Sullivan, individually and d/b/a Sullivan Machine & Tool Company; and Josephine Sullivan, v. Ray Morgan Thompson and Armbrecht, Jackson, DeMouy, Crowe, Holmes, & Reeves Charles Sullivan, individually and d/b/a Sullivan Machine & Tool Company; and Josephine Sullivan v. Mazak Corporation.
1980771, 1980979 and 1980980.

2000 Ala. LEXIS 344

August 11, 2000, Released

PRIOR HISTORY: Appeals from Mobile Circuit Court. (CV-95-935). TRIAL JUDGE: Edward B. McDermott.

DISPOSITION: AFFIRMED IN PART; REVERSED IN PART; AND REMANDED. CASE SUMMARY

PROCEDURAL POSTURE: In suit alleging concealment of relationship with juror, plaintiff claimed the Mobile Circuit Court (Alabama) erred in entering summary judgment for defendant defense attorneys. Defendant attorney, hired as jury consultant, claimed that summary judgment should have been granted in his favor.

OVERVIEW: Plaintiff discovered that defendant attorney, hired by defendant defense counsel as a jury consultant, was the brother-in-law of the jury foreman. Plaintiff filed a motion for relief from judgment and was granted a new trial, but the circuit court held that defendant attorneys had not engaged in improper conduct. Plaintiff then filed another action in a second circuit court against defendant

attorneys alleging fraud, misrepresentation, and suppression. All of the requirements for collateral estoppel were met. Determination whether defendants misrepresented a relationship with the juror was necessary to the first circuit court's ruling on the motion for relief from judgment. The parties involved in the hearing were the same parties named in the second complaint. Plaintiff was therefore precluded from relitigating the issue whether defendants acted improperly.

OUTCOME: Collateral estoppel precluded plaintiff from relitigation of claims that defendant attorneys acted improperly in concealing relationship with juror. Same issues and parties were involved in prior claim. Summary judgment should have been entered in favor of all defendants.

COUNSEL: For Appellants: D. Scott Wright and Thomas H. Nolan, Jr., of Brown, Hudgens, P.C., Mobile, for Bayless Edward Biles, Jr., and Wilkins, Bankester, Biles & Wynne, P.A.

Joseph J. Boswell, Mobile; and Mona A. Vivar of Atchison, Crosby, Saad & Beebe, Mobile, for Charles Sullivan, individually and d/b/a Sullivan Machine & Tool Company; and Josephine Sullivan.

For Appellees: Wesley Pipes, Michael C. Niemeyer, and Ryan T. Northrup of Lyons, Pipes & Cook, P.C., Mobile, for Mazak Corporation.

John L. Leach, Jr., Joseph D. Steadman, and John T. Dukes of Helmsing, Sims & Leach, P.C., Mobile, for Ray M. Thompson and Armbrecht, Jackson, DeMouy, Crowe, Homes & Reeves.

Amicus curiae Alabama Trial Lawyers Association: Donald R. Rhea of Rhea, Boyd & Rhea, Gadsden.

Amicus curiae Alabama State Bar: J. Anthony McLain, general counsel; and Robert E. Lusk, Jr., asst. general counsel, Alabama State Bar.

Amicus curiae Alabama Defense Lawyers Association: Rhonda Pitts Chambers of Rives & Peterson, Birmingham.

JUDGES: ENGLAND, Justice. Hooper, C.J., and Maddox and Brown, JJ., concur. Houston, J., concurs specially. Johnstone, J., concurs in part and concurs in the result in part. See, J., concurs in the result. Lyons, J., recuses himself.

OPINION BY: ENGLAND

OPINION:

ENGLAND, Justice.

On February 28, 1991, Charles Sullivan and Josephine Sullivan, d/b/a Sullivan Machine & Tool Company sued Mazak Corporation, in the Baldwin Circuit Court, alleging fraudulent misrepresentation, fraudulent suppression, deceit, breach of contract, breach of warranty, and conspiracy to violate §§ 13A-9-11 and 13A-9-12, Ala.Code 1975, after Mazak sold a machine to Sullivan Machine that did not perform up to its alleged expectations. Mazak filed a counterclaim, alleging breach of a lease agreement and unjust enrichment. The jury was struck on March 15, 1993, and the trial commenced on March 17, 1993. Josephine Sullivan was dismissed as a plaintiff in that action before the trial commenced. On March 24, 1993, the trial court entered a judgment in favor of

Mazak, based on the jury's verdict. Subsequently, Josephine Sullivan discovered that an attorney hired by Mazak's counsel as a jury consultant was the brother-in-law of the jury foreman. Charles Sullivan filed a motion for relief from judgment, pursuant to Rule 60(b)(6), Ala. R. Civ. P., after learning that the brother-in-law of attorney Bayless Edward Biles, Jr. had served as the jury foreman. When the jury was being struck, the prospective jurors were asked if they knew any of the lawyers at the trial. Prospective juror Pete Jones responded that he knew Biles. The trial judge then asked Biles whether he was "connected with this case," and Biles answered that he was not.

Ray Morgan Thompson, a mobile attorney hired by Mazak in the Baldwin County action and a partner in the law firm of Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, had hired Biles as a jury consultant in regard to the Baldwin County action. Biles is a partner in the law firm of Wilkins, Bankester, Biles & Wynne, P.A. On May 9, 1994, Judge Charles C. Partin, of the Baldwin Circuit Court, entered an order granting Charles Sullivan a new trial, but concluded that Biles had not engaged in any improper conduct. On March 15, 1995, before the second trial of the Baldwin County action, Charles Sullivan and his wife Josephine Sullivan[1] filed a complaint in the Mobile Circuit Court against Bayless Edward Biles, Jr.;

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[1] Josephine Sullivan had been dismissed as a party in the Baldwin County action before that case was tried. Consequently, she does not have standing to appeal based on any alleged misconduct that may have occurred in that action. See Sho-Me Motor Lodges, Inc. v. Jehle-Slauson Constr. Co., 466 So. 2d 83 (Ala. 1985).

Ray Morgan Thompson; Wilkins, Bankester, Biles & Wynne; Armbrecht, Jackson, Demouy, Crowe, Holmes & Reeves; and Mazak, alleging fraud, misrepresentation, and suppression. Charles Sullivan further alleged that in the Baldwin County action he had been deprived of a jury selected in accordance with the laws and rules of procedure of the State of Alabama.[2] The defendants filed motions for summary judgment. On May 10, 1996, Judge Edward B. McDermott placed the Mobile County action on his administrative docket, i.e., delayed it, pending the retrial of the Baldwin County action. On September 14, 1998, after a second trial in the Baldwin County action, the jury awarded Mazak damages of $250,234.12 based on its unjust-enrichment counterclaim. On February 1, 1999, after hearing oral arguments, Judge McDermott entered a judgment in the Mobile County action in favor of Mazak, Thompson, and the Armbrecht law firm. He entered an order denying Biles and Wilkins-Bankester's motion for summary judgment, holding that Biles had had a duty to the court and to all the litigants to speak the truth when he responded to Judge Partin's question regarding his involvement in the Baldwin County action. Judge McDermott further held that the question whether Biles's response was truthful or fraudulent was a question of fact for a jury. He concluded that Biles had acted as an independent contractor, and, thus, that neither Thompson nor the Armbrecht firm was liable to Sullivan. Sullivan appeals the final order of Judge McDermott entering a

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[2] Sullivan also filed a claim for "breach of the Rules of Professional Responsibility" in the Mobile County action. However, this claim was dismissed, based on Sullivan's stipulation.

summary judgment in favor of Thompson and the Armbrecht law firm. Biles and Wilkins-Bankester (by permission of this Court, *see* Rule 5, Ala. R.App. P.) appeal Judge McDermott's order denying their motions for summary judgment. We affirm in part, reverse in part, and remand.

Ray Thompson, counsel for Mazak, hired attorney Bayless Biles to serve as a jury consultant in the action Sullivan had filed against Mazak in the Baldwin Circuit Court. Biles testified that he was hired to help Thompson pick a jury in that Baldwin County action. Biles did not assist in any other aspect of the case, nor did he sit with representatives of the defendant Mazak or its attorneys. Biles was present when the judge in the Baldwin County action conducted voir dire examination of prospective jurors. Biles met with Mazak's counsel, Thompson, outside the presence of the jury, to discuss which jurors should be struck. The following exchange occurred when Sullivan's counsel questioned prospective jurors:

"MR. GIBSON [Counsel for Charles Sullivan]: Right. Now, you've already been asked if you are related to the lawyers or if you know them in the way the judge has described, a friend and what-not. I would like to know if now having had some more time to think about it, you recognize any of the lawyers here as people that you know for any reason. If you know them, I would like to know that. You know them at all?

"A PROSPECTIVE JUROR: You're talking about within this room?

"MR. GIBSON: Yes, sir.

"A PROSPECTIVE JUROR: I know Bayless Biles.

"MR. GIBSON: Oh, Mr. Biles. Thank you.

"THE COURT: You're not connected with this case, are you?

"MR. BILES: No, sir.

"MR. GIBSON: You are Mr. Jones; is that right? Thank you Mr. Jones."

The prospective juror was Pete Jones, Biles's brother-in-law.

Sullivan later filed in the Baldwin Circuit Court a motion, pursuant to Rule 60(b)(6), for relief from the judgment entered based on the jury's verdict in favor of Mazak. Sullivan alleged in his motion that the defendants had concealed from the Court and from Sullivan's attorneys the true relationship between Biles and the prospective juror, Pete Jones. He further alleged that the defendants' conduct had deprived him of a fair and impartial trial. He requested the following relief in his Rule 60(b)(6) motion:

"(a) Entry of an Order by the Court pursuant to Rule 60(b)(6) granting a new trial in this cause for all of the reasons described in this motion.

"(b) In the alternative, and should the Court for any reason elect not to grant relief requested pursuant to Rule 60(b)(6) . . . , then Charles W. Sullivan requests that this action be treated as an independent action filed within a reasonable time not to exceed three (3) years from date of entry of the judgment or order in this matter to set aside the judgement dated March 24, 1993.

"(c) For such other further and different relief as to which he may be entitled, premises considered."

After he had filed the Rule 60(b)(6) motion for relief from judgment, Sullivan filed a complaint in the Mobile Circuit Court, in which he alleged the defendants had, in the Baldwin County action, misrepresented the fact that the jury foreman in that case was Biles's brother-in-law. Sullivan alleged that the defendants had committed fraud, had misrepresented material facts, had omitted material facts, and had suppressed material facts, and that as a result he had suffered emotional distress and anguish, economic injury, and damage to his business and personal reputation. He further alleged that he had been deprived of a jury selected in accordance with the laws and rules of procedure of the State of Alabama, and he sought punitive damages.

Discussion

A summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c)(3), Ala. R. Civ. P. The moving party has the burden of showing that no material fact is in dispute. *See Lipman v. General Motors Corp.*, 665 So.2d 190 (Ala. 1995). If the moving party makes that showing, the burden then shifts to the nonmovant to present "substantial evidence" creating a genuine issue of material fact. *Id.* "Substantial evidence" is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founders Life Assurance Co.*, 547 So.2d 870, 871 (Ala. 1989). This Court's "review

of a summary judgment is *de novo*," and in reviewing a summary judgment "[t]his Court must . . . view the evidence in a light most favorable to the nonmovant." *Lott v. Tarver*, 741 So.2d 394, 397 (Ala. 1999).

Biles and Wilkins-Bankester argue that the doctrine of collateral estoppel precludes Sullivan from relitigating in the Mobile County action the issue whether in the Baldwin County action they misrepresented or suppressed the fact that the jury foreman was Biles's brother-in-law. For the doctrine of collateral estoppel to apply, the following elements are required:

"(1) that an issue in a prior action was identical to the issue litigated in the present action; (2) that the issue was actually litigated in the prior action; (3) that resolution of the issue was necessary to the prior judgment; and (4) that the same parties are involved in the two actions."

Smith v. Union Bank & Trust Co., 653 So.2d 933, 934 (Ala. 1995). " 'Where these elements are present, the parties are barred from relitigating issues actually litigated in a prior [action].' " *Smith*, 653 So.2d at 934 (quoting *Lott v. Toomey*, 477 So.2d 316, 319 (Ala.1985)).

Both in his motion for relief from judgment in the Baldwin County action and in his complaint in the Mobile County action, Sullivan alleged that he had been deprived of a fair jury trial because, he said, the defendants had concealed Biles's relationship with jury foreman Pete Jones. Judge Partin held a hearing to determine whether Sullivan was entitled to a new trial, to determine whether any of the defendants had engaged in improper conduct, and to determine what relief, if any, Sullivan was entitled to. He concluded that, although Biles had

not acted improperly, Sullivan was entitled to a new trial. It was within the court's discretion not only to grant Sullivan a new trial, but also to sanction the defendants for any improper conduct. A determination whether the defendants concealed or misrepresented Biles's relationship with Jones was necessary to the Baldwin Circuit court's ruling on the motion for relief from judgment. That court had to resolve this issue, because it was the very basis of Sullivan's request for relief from the judgment. Moreover, Sullivan not only sought a new jury trial, but also "such other and different relief as to which he may be entitled." The parties involved in the hearing on Sullivan's request for relief in the Baldwin County action are the same parties that Sullivan named in the complaint in the Mobile County action.

All of the requirements for collateral estoppel are met. Therefore, Sullivan is precluded from relitigating in the Mobile County action the issue whether, in the Baldwin County action, the defendants acted improperly with regard to disclosing Biles's relationship with Jones.

The summary judgment entered for Mazak, Thompson, and the Armbrecht firm is affirmed. The order denying the motions for summary judgment filed by Biles and Wilkins-Bankester is reversed. We remand this case for an order consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Hooper, C.J., and MADDOX and BROWN, JJ., concur.

Houston, J., concurs specially.

Johnstone, J., concurs in part and concurs in the result in part.

See, J., concurs in the result.

Lyons, J., recuses himself.

CONCUR BY: HOUSTON; JOHNSTONE (In Part)

CONCUR:

HOUSTON, Justice (concurring specially).

On February 5, 1988, this Court wrote in a case of first impression in this State:

"Alabama's Code of Professional Responsibility, which is patterned primarily after the ABA Model Code of Professional Responsibility, limits the remedies for violations of Disciplinary Rules to disciplinary measures. . . .

" . . . We hold that an alleged violation of a Disciplinary Rule of the Code of Professional Responsibility cannot, independently, serve as a legal basis of a civil action for money damages."

Terry Cove North, Inc. v. Marr & Friedlander, P.C., 521 So.2d 22, 23-24 (Ala.1988).

This holding was codified, as to all acts and omissions occurring after April 12, 1988, in Alabama Code 1975, § 6-5-578(b):

"[T]he fact that a legal service provider violated any provision of the rules of professional conduct shall not give rise to an independent cause of action or otherwise be used in support of recovery in a legal services liability action."

The Alabama Rules of Professional Conduct, effective January 1, 1991, are consistent with the former judicial and legislative pronouncements:

"Violation of a Rule [of Professional Conduct] should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty."

Ala. R. Prof. Conduct, "Scope" (paragraph 6).

Therefore, to the extent that Charles Sullivan, or the Sullivans, base their claim on some alleged independent, private cause of action against the defendant attorneys for an alleged violation of the Alabama Rules of Professional Conduct, the court properly entered the summary judgment, for no such cause of action exists.

JOHNSTONE, Justice (concurring in part and concurring in the result in part).

I concur to affirm the summary judgment in favor of the Mazak Corporation, Thompson, and the Armbrecht firm. I concur in the result to reverse the denial of the motion for summary judgment filed by Biles and Wilkins-Bankester, a ruling we are reviewing on a permissive interlocutory appeal pursuant to Rule 5(a), Ala. R.App. P.

I question whether the elements of collateral estoppel are present as a defense for Biles and Wilkins-Bankester. While the order granting a new trial in the Baldwin County case was appealable, I question whether it constitutes a "prior judgment" sufficient to estop Sullivan in his Mobile County action. Moreover, neither Biles nor Wilkins-Bankester was a party to the Baldwin County action. Thus, no judgment in that action could collaterally estop Sullivan from suing them in Mobile County. Rather, summary judgment in favor of Biles and Wilkins-Bankester is appropriate for the reasons stated in Justice Houston's special writing, which I join.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA
March 30, 2001

1980771

Bayless Edward Biles, Jr. and Wilkins, Bankester, Biles & Wynne, P.A. v. Charles Sullivan et al. (Mobile Cir.Ct.No.: CV-95-935)

1980979

Charles Sullivan, individually and d/b/a Sullivan Machine & Tool Company and Josephine Sullivan v. Ray Morgan Thompson and Armbrecht, Jackson, DeMouy, Crowe, Holmes, & Reeves (Mobile Cir.Ct.No.: CV-95-935)

1980980

Charles Sullivan, individually and d/b/a Sullivan Machine & Tool Company and Josephine Sullivan v. Mazak Corporation (Mobile Cir.Ct.No.: CV-95-935)

ORDER

IT IS ORDERED that the applications for rehearing filed in the above causes be, and the same are hereby, overruled. NO OPINION.

WOODALL, J. – Moore, C.J., and Houston, Brown, Johnstone, Harwood and Stuart, JJ., concur; See and Lyons, JJ., recuse.

Supreme Court, U.S.
FILED
JUL 26 2001
OFFICE OF THE CLERK

No. 01-27

In The

Supreme Court of the United States

CHARLES SULLIVAN, individually, and d/b/a SULLIVAN MACHINE & TOOL COMPANY, and JOSEPHINE SULLIVAN,

Petitioners,

vs.

BAYLESS E. BILES, JR., and WILKINS, BANKSTER, BILES & WYNNE, P.A.; RAY MORGAN THOMPSON and ARMBRECHT, JACKSON, DeMOUY, CROWE, HOLMES & REEVES; MAZAK CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID SCOTT WRIGHT
THOMAS H. NOLAN, JR.*
BROWN, HUDGENS, P.C.
Post Office Box 16818
Mobile, Alabama 36616-0818
(334) 344-7744

Attorneys for Respondents Bayless E. Biles, Jr., and Wilkins, Bankster, Biles & Wynne, P.A.

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

DISCLOSURE STATEMENT

Respondent Wilkins, Bankster, Biles & Wynne, P.A., is a law firm formed as a professional association under Alabama law, and there are no parent corporations nor any publicly held company that owns ten percent or more of the professional association.

TABLE OF CONTENTS

Page

DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

REASONS FOR DENYING THE WRIT 7

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES:

Adams Co. v. Burlington & M.R.R.Co., 112 U.S. 123 (1884) 9

Alabama Power Company v. Turner, 575 So.2d 551 (Ala. 1991) 8

Austin v. Pepperman, 278 Ala. 551, 179 So.2d 299 (1965) 8

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 8

Brown v. Brown, 680 So.2d 321 (Ala.Civ.Ap. 1996) 13

Capitol Chevrolet, Inc. v. Smedley, 614 So.2d 439 (Ala. 1993) 13

Central Alabama Electric Cooperative v. Tapley, 546 So.2d 371 (Ala. 1989) 8

Century 21 Preferred Properties, Inc. v. Alabama Rural State Commission, 401 So.2d 764 (Ala. 1981) 13

Christian Television Corp. of Alabama v. RCH Broadcasting, Inc., 554 So.2d 989 (Ala. 1989) 13

Constantine v. U.S.F. & G., Inc., 545 So.2d 750 (Ala. 1989) 13

Cincinnati Insurance Company v. Synergy Gas, Inc., 585 So.2d 822 (Ala. 1991) 13

City of Birmingham v. Tutwiler Drug Company, Inc., 475 So.2d 458 (Ala. 1985) 13

Cooley v. Knapp, 607 So.2d 146 (Ala. 1992) 8

TABLE OF AUTHORITIES – Continued

Page

Cooper v. Green, 359 So.2d 377 (Ala. 1978) 8

Eustis v. Boller, 150 U.S. 361 (1893) 9

HealthAmerica v. Minton, 551 So.2d 235 (Ala. 1989) 8

Heath v. Alabama, 474 U.S. 82 (1985) 9

Iverson v. Expert Tune, Inc., 553 So.2d 82 (Ala. 1989) 13

Kirkland v. Kirkland, 281 Ala. 42, 198 So.2d 771 (1967) 8

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 15

Leathe v. Thomas, 207 U.S. 93 (1907) 10

Marion v. Hall, 429 So.2d 937 (Ala. 1983) 8

Michigan v. Long, 463 U.S. 1032 (1983) 11

Northern Pac.R. Co. v. Ellis, 144 U.S. 458 (1892) 9

Owen v. Miller, 414 So.2d 889 (Ala. 1981) 13

Rhodes Mutual Life Ins. Co. v. Moore, 586 So.2d 866 (Ala. 1991) 13

United Service Automobile Association v. Wade, 544 So.2d 906 (Ala. 1989) 8

Walden v. Hoke, 429 S.E.2d 504 (W.Va. 1993) 13

West v. City of Mobile, 689 So.2d 14 (Ala. 1997) 13

STATUTES:

Ala. Code § 12-1-7 13

Ala. Code § 12-1-8 13

TABLE OF AUTHORITIES – Continued

Page

Ala. Code § 12-1-9 13

Ala. Code § 12-11-30(5) 13

RULES:

Rule 60(b)(6) *Alabama Rules of Civil Procedure* 3, 12

JURISDICTIONAL STATEMENT

This Honorable Court should decline jurisdiction because the Petitioners have not presented an important question of federal law that was timely presented to and decided by the Supreme Court of Alabama, nor have Petitioners presented to the Court a decision on a federal question that conflicts with the relevant decisions of this Court.

STATEMENT OF THE CASE

Charles and Josephine Sullivan, d/b/a Sullivan Machine & Tool Company, filed a civil action in the Circuit Court of Baldwin County, Alabama, alleging breach of contract and other claims against Mazak Corporation concerning a milling machine manufactured by Mazak and purchased by Sullivan.[1] Sullivan Machine & Tool Company is a sole proprietorship owned solely by Charles Sullivan.[2]

Mazak Corporation filed a counterclaim in the Baldwin County action seeking payment for the vertical milling machine. The case proceeded to trial in March of 1993. The jury returned a verdict against Sullivan on Sullivan's claims against Mazak and in favor of Mazak on its counterclaim. No judgment was rendered against Josephine Sullivan, as she was dismissed by stipulation of

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[1] This Baldwin County lawsuit is referred to at times as the "Baldwin County action."

[2] Charles Sullivan and Sullivan Machine & Tool Company are referred to as "Sullivan."

the parties before the case was submitted to the jury. (C 190-191, 199-200, 221-223).

This dispute arises out of a question asked by Baldwin County Circuit Judge Charles Partin during proceedings to select a jury on March 15, 1993, and the answer given by attorney Bayless E. Biles in open court. Mazak Corporation was represented in the Baldwin County action by the law firm of Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves of Mobile, Alabama. Primary counsel for Mazak was Ray Thompson. One week prior to trial, attorney Ray Thompson contacted attorney Bayless Biles, a Baldwin County attorney, and requested that Mr. Biles serve as a jury consultant to advise Mr. Thompson in the selection of a jury. Attorney Biles was paid a flat fee for services to attorney Thompson, and Mr. Biles sole involvement in the Baldwin County action was as a jury consultant to the attorneys for Mazak. Mr. Biles never sat at the same table as counsel for Mazak Corporation at any time. There is no evidence that any juror was ever aware that Mr. Biles played any role as a jury consultant to the attorneys for Mazak Corporation until after the verdict was rendered. Mr. Biles did not even sit with defendant Mazak Corporation's attorneys during the process of jury selection, and did not meet and confer with those counsel in the presence of the jury; rather, Mr. Biles met with counsel for Mazak only outside the presence of the jury (in a separate room outside the courtroom) where Mr. Biles and Mazak attorneys went over the jury panel list and discussed potential jurors. (C 145, 157-159, 161-163, 171-175). Mr. Biles did not participate in the voir dire questioning nor in the actual striking of any potential jurors; Mr. Biles' role was limited to consulting with

Mazak's attorney outside the presence of the jury. (C 145-146, 165-166, 171-175).

After the trial court conducted a voir dire examination of prospective jurors and when Sullivan's counsel was questioning prospective jurors, the trial court asked Mr. Biles (who was then in the courtroom near the judge) whether he was connected with the case, and Mr. Biles answered in the negative. Since his only involvement was the limited role of jury consultant to counsel for Mazak and he had no stake or interest in the case, Mr. Biles did not believe he was an attorney in the case. Both Mr. Biles and attorney Thompson understood the question from the court to be an inquiry as to whether Mr. Biles was an attorney in the case, and both lawyers believed Mr. Biles was not an attorney in the case. (C 164-169, 140-141, 145-147). In any event, the court was not informed of Mr. Biles' role as a jury consultant to Mazak's attorney.

On a couple of occasions during the course of the trial, when Mr. Biles was otherwise in the Baldwin County Courthouse, Mr. Biles observed a few minutes of the trial but never sat at Mazak's counsel's table. (C 135-136, 171-172). Although Mr. Biles' brother-in-law, Mr. Jones, served on the jury, Mr. Biles had no contact with Mr. Jones during the course of the trial and Mr. Biles first spoke with Mr. Jones one week after the verdict. (C 137-138, 146).

Sullivan filed a motion for relief from judgment of the Baldwin County action, pursuant to Rule 60(b)(6) of the *Alabama Rules of Civil Procedure*, in April of 1994. (C 670-687). The basis for this motion was Sullivan's claim that attorney Bayless Biles and the attorneys for Mazak

wrongfully concealed from the trial court and from Sullivan a material fact (that Mr. Biles was a consultant to Mazak's attorneys) during the proceedings in the Baldwin County action. In Sullivan's prayer for relief in this Rule 60(b) motion, Sullivan specifically requested that the Circuit Court enter an order "granting a new trial in this case for all of the reasons described in this motion." Sullivan also expressly sought "such other further and different relief as to which he may be entitled, premises considered." (C 687).

In written pleadings in support of the motion for relief from judgment, Sullivan repeatedly alleged that there had been a "concealment" during the Baldwin County action by Biles and Mazak's attorneys. (C 677-678, 279-288). Sullivan's motion was heard in a special hearing in the Circuit Court of Baldwin County on April 27, 1994. Sullivan argued at the hearing that Biles and Mazak's attorneys concealed material facts from the trial court and Sullivan. After considering all the evidence presented, which included the sworn deposition testimony of Mr. Biles, and arguments advanced, Circuit Judge Partin issued a written order on May 9, 1994, which granted Sullivan a new trial, but did not grant any further or other relief, such as sanctions or the imposition of attorney's fees or costs, because the trial court found there had been no attorney misconduct by Biles or Thompson. Judge Partin found that Mr. Biles answered the court's question in the negative because there was a "misunderstanding" as to the nature of the court's inquiry, and the court expressly found there was no wrongdoing by the attorneys involved. (C 972-973). "The court expressly finds that Mr. Biles had no intention to mislead the court

and the court determines that there was no improper conduct on the part of Mr. Biles." (C 972).

The current action was instituted by Charles and Josephine Sullivan, d/b/a Sullivan Machine & Tool Company, filing a civil complaint in the Circuit Court of Mobile County in 1995 in which Sullivan alleged fraud, deceit, conspiracy, and other causes[3]. It is unclear to respondent why Josephine Sullivan is listed as a petitioner when Sullivan agreed, in the Circuit Court of Mobile County, that Josephine Sullivan had no standing to maintain any claims. (C 373).

Mr. Biles and his law firm and Mr. Thompson and his law firm filed motions for summary judgment in the Mobile County action raising numerous state law grounds in support of their motions, including, inter alia, collateral estoppel, res judicata, the absence of a private cause of action under Alabama law for alleged attorney misconduct during adversarial proceedings, absolute immunity under Alabama law from civil liability for statements made in open court and related to a judicial proceeding, the absence of any tort law duty owed by the defendants to Sullivan, the total absence of any damages since Sullivan got a new trial in the Baldwin County action and lost again. (C 94-113). The judge in the Mobile County action granted Mr. Thompson and his law firm's motion for summary judgment but denied the motion for summary judgment by Mr. Biles and his law firm. (C 759). Sullivan appealed to the Supreme Court of Alabama from

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[3] This civil action is referred to as the "Mobile County action."

the summary judgment entered in favor of defendant Thompson and his law firm, and Mr. Biles and his law firm appealed from the trial court's denial of summary judgment.

Although Sullivan filed a brief in opposition to the motions for summary judgment in the Mobile County action (C 350-375), Sullivan never asserted, at the trial court level, that application of Alabama's law of collateral estoppel as a basis for summary judgment against Sullivan would violate the Due Process Clause or any other provision in the Constitution of the United States. Similarly, Sullivan made no such arguments in the Supreme Court of Alabama prior to the August 11, 2000, decision.

The very first issue raised in the Brief of Appellant of Mr. Biles, in the Supreme Court of Alabama, was whether collateral estoppel or res judicata barred Sullivan's claims in the Mobile County action. Even though Sullivan filed several briefs in the Supreme Court of Alabama, before it issued its August 11, 2000, decision, Sullivan never asserted that application of collateral estoppel to the fact findings of Judge Partin in the Baldwin County action would violate Sullivan's rights under the Constitution of the United States.[4]

The first time Sullivan raised any constitutional issue as to the application of collateral estoppel in this case was in Sullivan's application for rehearing in the Supreme

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[4] Sullivan actually filed at least three briefs on May 19, 1999, July 6, 1999, and June 24, 1999 in the consolidated appeals, before the decision by the Supreme Court of Alabama, but did not assert in any of these briefs that application of collateral estoppel would violate the Due Process Clause.

Court of Alabama. Sullivan's application for rehearing was denied on March 30, 2001, without any further opinion.

SUMMARY OF ARGUMENT

The decision of the Alabama Supreme Court in this case rests solely on state law grounds. There is no question arising under any federal statute or provision of the Constitution of the United States which has been properly presented or decided in the courts below. Even if the alleged federal issue had been timely raised and actually decided in the Alabama Supreme Court, there would be no basis for review because there is no important federal question involved.

REASONS FOR DENYING THE WRIT

I. NO FEDERAL ISSUE WAS TIMELY PRESENTED IN THE COURT BELOW NOR DECIDED BY THE ALABAMA COURT, AND THE DECISION BELOW RESTS ON INDEPENDENT STATE LAW GROUNDS.

Sullivan did not raise any constitutional challenges to giving collateral estoppel preclusive effect to Judge Partin's fact findings in Sullivan's opposition to the motions for summary judgment in the Mobile County action. Sullivan did not raise any such constitutional challenges in the several briefs Sullivan filed in the Supreme Court of Alabama before it issued the decision. The Alabama Supreme Court held that Sullivan's claims

in the Mobile County action were barred by application of collateral estoppel to the findings of fact made by Judge Partin in his May 9, 1994, order. Sullivan did not raise any constitutional objection to the application of collateral estoppel until Sullivan's application for rehearing. Sullivan's untimely constitutional objection to collateral estoppel comprised only a small portion of Sullivan's sixty-five page application for rehearing. The rehearing application was denied without further opinion, so there is no decision on Sullivan's untimely raised federal issue.

Constitutional issues or questions not presented in the trial court normally are not considered on appeal by the Alabama Supreme Court. *Cooley v. Knapp*, 607 So.2d 146 (Ala. 1992); *Alabama Power Company v. Turner*, 575 So.2d 551, 553 (Ala. 1991); *Central Alabama Electric Cooperative v. Tapley*, 546 So.2d 371, 375 (Ala. 1989); *United Service Automobile Association v. Wade*, 544 So.2d 906, 917 (Ala. 1989); *HealthAmerica v. Minton*, 551 So.2d 235, 247 (Ala. 1989); *Marion v. Hall*, 429 So.2d 937, 939 (Ala. 1983); *Cooper v. Green*, 359 So.2d 377 (Ala. 1978). The Alabama Court also does not consider issues raised for the first time in an application for rehearing. *Kirkland v. Kirkland*, 281 Ala. 42, 49, 198 So.2d 771 (1967); *Austin v. Pepperman*, 278 Ala. 551, 572, 179 So.2d 299 (1965). There is no indication the Alabama Court departed from these rules to even consider any federal issues Sullivan may have raised on rehearing.

As was observed in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988), the Court normally declines to exercise certiorari jurisdiction under such circumstances:

> As this Court stated in *Webb v. Webb*, 451 U.S. 493, 501, 69 L.Ed.2d 392, 101 S.Ct. 1889 (1981), '[a]t the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *federal* Constitution was presented in the state courts and that those courts were appraised of the nature or substance of the federal claim at the time and in the manner required by state law.'

"Even if we were not jurisdictionally barred from considering claims not pressed or passed upon in the state court, as has sometimes been stated . . . , the long standing rule that this Court will not consider such claims creates, at the least, a weighty presumption against review." *Heath v. Alabama*, 474 U.S. 82, 87 (1985).

Like the decision of the Supreme Court of Wisconsin which this Court declined to review in *Northern Pac.R. Co. v. Ellis*, 144 U.S. 458, 464 (1892), the decision of the Supreme Court of Alabama "rested upon an independent ground, not involving a federal question, and broad enough to maintain the judgment." "The judgment before us was rendered in accordance with well-settled principles of general law, not involving any federal question, . . . " *Id.* at 465.

In order for this Court to have jurisdiction to review the judgment of a state court, "it must appear affirmatively, not only that a federal question was raised and presented for decision to the highest court of the state having jurisdiction, but that it was decided, or that its decision was necessary to the judgment that was rendered." *Adams Co. v. Burlington & M.R.R.Co.*, 112 U.S. 123, 127 (1884). *See Eustis v. Boller*, 150 U.S. 361 (1893). In this

case, no federal question was raised or timely presented for decision in the state courts, no federal question was decided, and resolution of a federal question was not necessary to the decision below.

"It is admitted that the general and wellsettled rule is that in a case coming from a state court this Court can consider only Federal questions, and that it cannot entertain the case unless the decision was against the plaintiff in error upon those questions." *Leathe v. Thomas*, 207 U.S. 93, 98 (1907). "It is admitted further, that a decision upon those questions must have been necessary to the decision of the case, so that, if the judgment complained of is supported also upon other and independent grounds, the judgment must be affirmed or the writ of error dismissed, as the case may be." *Id.*

Mr. Biles moved for summary judgment on the grounds of the state law rule of collateral estoppel. Sullivan argued that under Alabama law, in Sullivan's view, the fact findings of Judge Partin in the Baldwin County action should not be given preclusive effect in the Mobile County action. The trial court erroneously denied Mr. Biles' summary judgment motion, Biles appealed, and Biles argued on appeal that collateral estoppel should have been applied. The Supreme Court of Alabama correctly applied Alabama principles of collateral estoppel and held that summary judgment should have been granted. This is the only issue that was decided in the Alabama Courts. At no time prior to the August 11, 2000, decision of the Alabama Court did Sullivan assert that application of collateral estoppel would violate due process of law. Since the only issues actually presented and

litigated in the courts below are questions of state substantive law, this Court should decline to grant certiorari even if the Alabama Court erroneously interpreted or applied Alabama law of collateral estoppel.

"Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 1041. "The principle that we will not review judgments of state courts that rest on adequate and independent state grounds is based, in part, on 'the limitations of our own jurisdiction.' " *Id.* at 1041-1042.

The decision of the Supreme Court of Alabama is clearly based on state law grounds. The only question decided by the Alabama Court was whether, under Alabama law, the fact findings of the trial court in the Baldwin County action contained in its May 9, 1994, order should be given preclusive effect in the Mobile County action. No federal issue is even mentioned in the August 11, 2000, decision. This Court should not undertake to review because the Supreme Court of Alabama's opinion clearly states the separate, adequate, and independent state law grounds for decision. In fact, no federal constitutional issue Sullivan now purports to advance had even been raised in the Alabama courts at that time. It cannot be argued that the non-federal ground was a device to

prevent review of the federal question when the alleged federal question had not even been raised.

The only issue decided was whether, under the unique facts and circumstances of this case, certain factual findings of a trial court ruling on a Rule 60(b) motion can preclude, by application of the Alabama law of collateral estoppel, relitigation of the same fact issue in another trail court. The trial court in the Baldwin County action specifically undertook to determine whether there was a concealment or other attorney misconduct (fraud) in the court proceedings before it and, after considering all the evidence gathered and the arguments of counsel, determined there was no concealment or attorney misconduct. Respondent Biles submitted at least eighteen pages of argument and authority to the Supreme Court of Alabama on this question of Alabama substantive law, including extensive discussion of the authorities governing when, such as in this instant matter, a person not technically a party to the prior proceeding can be bound by the litigation of fact issues so that estoppel is applied; the authority of an Alabama trial court to impose a variety of sanctions against a party or an attorney for misconduct during proceedings held before that court; the circumstances under which a party or its attorney can be considered a "virtual representative" of another person not a party to the litigation; and even discussion of authority from other jurisdictions expressly holding that factual findings issued in connection with Rule 60(b) motions can, in some circumstances, preclude relitigation of these facts in another trial court.

The authorities relied on by Biles in the Alabama court included the following: authority of an Alabama

trial court to impose sanctions and other punishments including, but not limited to, contempt, the award of attorney's fees, the award of costs, and entry of default, for misconduct during court proceedings, *Iverson v. Expert Tune, Inc.*, 553 So.2d 82 (Ala. 1989), *Cincinnati Insurance Company v. Synergy Gas, Inc.*, 585 So.2d 822 (Ala. 1991), *Capitol Chevrolet, Inc. v. Smedley*, 614 So.2d 439 (Ala. 1993), *City of Birmingham v. Tutwiler Drug Company, Inc.*, 475 So.2d 458 (Ala. 1985), *Ala. Code* § 12-1-7, § 12-1-8, § 12-1-9, § 12-11-30(5); application of collateral estoppel generally, *Constantine v. U.S.F. & G., Inc.*, 545 So.2d 750 (Ala. 1989), *Christian Television Corp. of Alabama v. RCH Broadcasting, Inc.*, 554 So.2d 989 (Ala. 1989); application of collateral estoppel to non-parties, *Owen v. Miller*, 414 So.2d 889 (Ala. 1981), *West v. City of Mobile*, 689 So.2d 14 (Ala. 1997), *Rhodes Mutual Life Insurance Company v. Moore*, 586 So.2d 866 (Ala. 1991), *Century 21 Preferred Properties, Inc. v. Alabama Rural State Commission*, 401 So.2d 764 (Ala. 1981); application of preclusive effect to a person who had a "virtual representative" on an issue decided in the prior proceeding, *Brown v. Brown*, 680 So.2d 321 (Ala.Civ.Ap. 1996), *West v. City of Mobile, supra.*; factual findings on a 60(b) ruling precluding relitigation of the same fact issues in another trial court, *Walden v. Hoke*, 429 S.E.2d 504 (W.Va. 1993). Respondent will not attempt to reargue here the intricacies of Alabama law as applied to the facts of this case and which support the decision. There was substantial Alabama authority in support of giving preclusive effect to the fact findings made by Judge Partin.

This Honorable Court is not at liberty to inquire whether the decision of the Alabama Supreme Court in its application of Alabama substantive law of collateral

estoppel is right or wrong. Sullivan's alleged federal question had not even been raised before the Supreme Court of Alabama, so that it cannot be suggested that the decision of the Alabama Court was a mere device to prevent review of a Federal question. Under these circumstances, the petition must be denied.

THE ALLEGED ISSUE IS NOT AN IMPORTANT QUESTION OF FEDERAL LAW

Sullivan asserts that the allegedly incorrect application of Alabama law of collateral estoppel somehow deprived Sullivan of due process. Review should be denied because the alleged constitutional question is academic and episodic.

Any decision by the Court on any perceived federal issue would be a purely academic exercise and an advisory opinion. There are at least four other reasons why Mr. Biles was entitled to summary judgment under Alabama substantive law. In other words, if this Court were to grant review and reverse the decision of the Supreme Court of Alabama, the final result in this case would remain the same because summary judgment was due to be granted on numerous state law substantive grounds. Any opinion in this case would be merely an advisory opinion or an academic exercise which would have no effect on the ultimate outcome of this case.

Review should be denied for the additional reason that the decision in this case is extremely fact specific and represents an isolated situation not likely to reoccur with any frequency. Collateral estoppel was applied here in a

very unusual fact situation because of the special and unique circumstances of the case. Certiorari should be granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, . . . " *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Any federal question that might conceivably arise upon the application of collateral estoppel in this case is of virtually no national importance and is of little significance to anyone beyond the litigants to this particular case.

CONCLUSION

The petition for writ of certiorari is due to be denied.

Respectfully submitted,

DAVID SCOTT WRIGHT
THOMAS H. NOLAN, JR.*
BROWN, HUDGENS, P.C.
Post Office Box 16818
Mobile, Alabama 36616-0818
(334) 344-7744

Counsel of Record